TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~416.~~ 200

ELIZABETH CROPLEY, APPELLANT,

vs.

WILLIAM COOPER, JOHN COOPER, AND JOSEPH COOPER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 12, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 416.

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vs.

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1 *Original bill of complaint.—Filed April* 8, 1871.

In the supreme court of the District of Columbia.

ELIZABETH CROPLEY, PLAINTIFF,
against
WILLIAM COOPER, JOHN COOPER, AND JOSEPH COOPER, def'ts.

No. 2341. Equity docket 11.

To the honorable justices of the supreme court of the District of Columbia, sitting in equity:

The plaintiff complains as follows:

1. That she is a resident of the District of Columbia, and the said defendant, William Cooper, is also a resident of said District; the said defendant, John Cooper, is a resident of Prince George's County, in the State of Maryland; and the said defendant, Joseph Cooper, is a resident of Philadelphia, in the State of Pennsylvania; and all
2 parties hereto are native-born citizens of the United States, and the said defendants are brothers of the plaintiff, and the said parties hereto, both plaintiff and defendants, are the only children of the late William Cooper, deceased.

2. That the said late William Cooper departed this life on the 22d day of December, A. D. 1845. That, by his last will and testament, bearing date the twenty-second day of August, A. D. 1845, an authenticated copy whereof is herewith filed, marked "E. C., No. 1," the said William Cooper devised and bequeathed to his wife, Sarah Cooper, all his stocks, and the rents arising from his house in the city of Washington, during her life, and also the usufruct of the farm in Prince George's County aforesaid, during her life, with power to sell the same, and appointed her sole executrix of said last will and testament. That the said Sarah Cooper afterwards departed this life on the 2d day of February, A. D. 1854, without having made sale of said farm, which passed, as directed by said will and hereinafter mentioned.

3 3. That in and by said will and testament the said William Cooper did will and devise to the said William Cooper, (defendant hereto,) after his mother's death, the interest on $1,250 stock of Potomac Insurance Company of Georgetown and a vacant lot on Capitol Hill, and at his (defendant William's) death, the said lot and stock were directed to be equally divided between said defendant's (William's) children, their heirs and assigns forever.

4. That in and by said will and testament the said testator did give and bequeath to his son John, (defendant hereto,) at his mother's death, the use in fruit of the said farm, or the interest of its avails if sold, for and during the life of said John Cooper; and provided, if said John should marry and have issue, that the said farm (or its avails if sold) should be equally divided among said John's children when they should arrive at the age of twenty-one years, the interest meanwhile to be applied to their maintenance; and that should John die with-
4 out issue, then the said farm, or its avails, were directed in said will to be equally divided between the testator's other children, share and share alike, to them, their heirs and assigns forever.

5. That in and by said last will and testament, the said testator gave and bequeathed to his son, the said defendant, Joseph Cooper, at his mother's death, for and during his life, the interest on $1,500 in Alexandria corporation stock, held by the testator; and at said Joseph's

death directed the said stock to be equally divided among the children of said defendant, Joseph Cooper.

6. That in and by said last will and testament, the said testator devised, gave, and bequeathed to this complainant, at her mother's death, the rent of the testator's house on *the* Pennsylvania avenue, for and during her (complainant's) life, and, at her decease, the testator declared it to be his will that the said house be sold, and the avails therefrom become the property of her (complainant's) children, or child, when he, she, or they shall have arrived at the age of twenty-one years, the interest in the mean time to be applied to their maintenance, as by reference to said copy of said will fully appears.

5

7. That, at the time of the making of the said will, and at the death of said testator, your complainant then had one child only, by name William Cooper Cropley, who attained the age of twenty-one years some time in the year of our Lord eighteen hundred and sixty-three; and that the said William Cooper Cropley departed this life on the eleventh day of December last, aged twenty-eight years, intestate, unmarried, and without issue, and leaving this complainant his sole heir-at-law and personal representative; that, shortly after the testator's death, another child (daughter) was born to this complainant, which last-mentioned child died in early infancy, leaving the said William C. Cropley, her only brother, surviving; and the plaintiff alleges further that she is fifty-six years of age, and is the widow of the late Richard Cropley, who died about the year 1851.

6

8. That the "house in the city of Washington," as mentioned in the testator's devise of the rent thereof to his wife, Sarah Cooper, and the "house on *the* Pennsylvania avenue in the city of Washington, situated on square ——," as mentioned in the testator's devise of the rent thereof to this complainant, remainder to her children, was that covering and embracing the eastern half part of lot numbered six, (6,) in square numbered three hundred and seventy-nine, (379,) as said lot and square are respectively designated upon the public plats and plan of the city of Washington, the same being the only house in said city of Washington which the testator owned at the date of his said will and at his death.

9. That the several devisees and legatees entered upon and are now enjoying their several devises and bequests to them; and this complainant avers that the estate given by said last will and testament to her children or child, when he, she, or they shall have arrived at the age of twenty-one years, was a vested one in your complainant's son, William C. Cropley, who did attain the age of twenty-one years, and departed this life, intestate, at the age of twenty-eight years; and by his said death, leaving no widow, child, or brother, and only your complainant as his sole heir-at-law and personal representative, the said vested interest passed to your complainant, who is now the sole owner of the house and ground hereinbefore mentioned.

7

10. That as such sole owner, she desires to make sale of said property, inasmuch as it now demands repairs, the expense of which she is both unable and unwilling to meet and discharge, and for the further reason that the proceeds arising from such sale will be more productive and beneficial to her than the property can be in its present condition; but now so it is that persons who are willing to become purchasers are apprehensive that the defendants may or will assert some claim or title to said property; and your complainant is advised and believes, and therefore charges, that the said defendant, William Cooper, does assert a title in himself and the other defendants in and to

8

said property, thereby creating a cloud upon the title of this complainant, which she is advised this court has the power to remove.

PRAYERS.

First. The plaintiff prays that the defendants hereto may full answer make to the matters and things hereinbefore alleged under their corporal oaths.

Second. That a decree may be passed by your honorable court divesting the said defendants, and each and all of them, of any title in or to the said described property, and vesting the same in this complainant, giving the true construction and interpretation of said last will and testament.

9 Third. That this honorable court will grant such other and further relief as to the court may seem meet and the interests of this complainant may require, and as in duty, &c.

ELIZABETH CROPLEY.

I do solemnly swear that I have read the foregoing bill by me subscribed, and know the contents thereof, and that the matters and things therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

ELIZABETH CROPLEY.

Subscribed and sworn to this 6th day of April, A. D. 1871, before me.

W'M MARTIN, *J. P.*

At the same time personally appeared John F. Hayes, who, being duly sworn, says that he is credibly informed and verily believes that the said defendant John Cooper resides in the State of Maryland, and

10 the said Joseph Cooper resides in the State of Pennsylvania, and that both are non-residents of the District of Columbia, and have no agent or attorney therein.

JOHN F. HAYES.

Subscribed and sworn to before me this 6th day of April, A. D. 1871.

W'M MARTIN, *J. P.* [SEAL.]

Exhibit to bill.—"*E. C., No.* 1."

I, William Cooper, of Prince George's County, State of Maryland, being of sound and disposing mind, do make and declare this to be my last will and testament: After my just debts are paid, as hereafter pointed out, I will and bequeath to my dear wife, Sarah Cooper, all my stocks which I own in corporate institutions, during her life; also the rents arising from my house in the city of Washington, provided that she keep the same duly repaired, properly insured, and pay the

11 taxes thereon. I also devise and bequeath to my said wife the usufruct of the farm on which I now reside, for and during her life, with the option of selling the same by her, provided such a price can be obtained for it as may be deemed satisfactory by her and two competent and disinterested persons of her own choosing, in which case my will is that the proceeds shall be invested in stocks of some sound corporate institutions, the interest from the same to be enjoyed by my said wife for and during her life, and at her death the said farm or its avails, if previously sold as above permitted, to be appropriated as hereinafter directed.

I will and devise to my son William, after his mother's death, the interest on twelve hundred and fifty dollars stock now held by me in the Potomac Insurance Company, Georgetown; I also will and bequeath to my said son William Cooper, a vacant lot on Capitol Hill, Washington, and at his death it is my will that the said vacant lot and aforementioned stock be equally divided between his children, their heirs and assigns forever.

To my son John I give and bequeath, at his mother's death, the usufruct of the aforementioned farm, or the interest of its avails, if previously sold, for and during his life, and should he marry and have legal issue, it is my will that the said farm, or, if previously sold, the avails thereof, together with any interest that may be due thereon at his decease, shall be equally divided amongst his children when they shall have arrived at the age of twenty-one years, the interest in the mean time to be applied to their maintenance. Should my son John die without lawful issue, it is my will that the said farm, or its avails, in case of its being sold, be equally divided between my other children, to share and share alike to them, their heirs and assigns forever.

To my son Joseph, at his mother's death, I give and bequeath for and during his life the interest on fifteen hundred dollars in the Alexandria corporation stock held by me, and his death the said stock be equally divided among his children.

To my daughter, Elizabeth Cropley, at her mother's death, I give and bequeath the rent of my house on Pennsylvania avenue, in the city of Washington, situated on square , for and during her life, and at her decease it is my will that the said be sold, and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years of age, the interest in the mean time to be applied to their maintenance.

It is my will and desire that my slaves, Ben and Clara, be free at the death of my wife, and my slave Frank to be free when he arrives at the age of thirty, each to be paid out of my estate, when entitled to their freedom, the sum of fifty dollars.

It is my will that my executrix pay all my just debts from the proceeds of the sale of my furniture, plate, books, cash, farming-stock, and all my other personal estate, not herein divided, as much of the same to be sold by her as may be necessary to pay said debts.

The balance I give and bequeath to my said executrix.

Lastly, I do hereby constitute my dear wife, Sarah Cooper, sole executrix of this my last will and testament, and revoking all others heretofore made by me.

In testimony whereof I have, on this twenty-first day of August, 1845, affixed my hand and seal.

WILLIAM COOPER. [SEAL.]

Signed, sealed, and delivered in the presence of the undersigned, as witnesses to the foregoing signature.

HANSON PENN.
J. H. T. MARSHALL.
BENJ. O. LOWNDES.

PRINCE GEORGE'S COUNTY, *set:*

OCTOBER 14TH, 1845.

Then came Hanson Penn, one of the subscribing witnesses to the within will, and made oath on the Holy Evangely of Almighty God

that he did see William Cooper, the testator therein named, sign
15 and seal the same, and heard him publish, pronounce, and declare the same to be his last will and testament; that at the time of his so doing, he was, to the best of his apprehension, of sound and disposing mind, memory, and understanding, and that he, together with J. H. T. Marshall and Benjamin Lowndes, the other two subscribing witnesses, respectfully subscribed their names as witnesses to this will in presence of the testator, at his request and in the presence of each other.

Sworn before—

JAMES HARPER,
Registrar of Wills for Prince George's County.

16 *Summons to answer.—Issued April 8th,* 1871.

In the supreme court of the district of Columbia, April 8th, 1872.

ELIZABETH CROPLEY, COMPLAINANT,
against
WILLIAM COOPER ET AL., DEFENDANTS. } No. 2341 equity.

The President of the United States to William Cooper, John Cooper, and Joseph Cooper, defendants.

You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office, on or before the special term
17 to which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's return.

"Summoned W'm Cooper.

"A. SHARP, *Marshal.*

"APRIL 8TH, 1871."

Order of publication.—Filed Ap'l 8th, 1871.

In the supreme court of the district of Columbia, the 8th day of April, 1871.

ELIZABETH CROPLEY
vs.
WILLIAM COOPER ET AL. } No. 2341 equity.

On motion of the complainant, by Messrs. Jones & Ashford, her solicitors, it is ordered that the defendants, John and Joseph Cooper, cause their appearance to be entered herein on or before the first rule-

day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default.

By the court:

MACARTHUR, *Justice.*

18 *Proof of Publication.*

OFFICE OF THE NATIONAL REPUBLICAN.
Washington, Ap'l 27, 1871.

I hereby certify that the advertisement of which the annexed is a copy, was published in the Daily National Republican once a week for three successive weeks, commencing April 10, 1871.

W. J. MURTAGH,
Proprietor Nat'l Republican.

Sworn and subscribed before me, this 27th day of April, 1871.
JOS. T. K. PLANT, *J. P.* [SEAL.]

Decree pro-confesso vs. William Cooper.—Filed May 13, 1871.

In the supreme court of the District of Columbia.

ELIZABETH CROPLEY
vs.
WILLIAM COOPER ET AL. } 2341. Equity docket 11.

The defendant, William Cooper, having been duly summoned to
19 appear on the 8th day of April, A. D. 1871, as appears by the return of the marshal, and having entered no appearance, nor filed any answer to the bill filed in said cause, it is by the court this 13th day of May, A. D. 1871, ordered, adjudged, and decreed that the bill of complaint filed in said cause be taken for confessed against said defendant William Cooper.

By the court:

MACARTHUR, *Justice.*

Decree pro-confesso vs. John & Joseph Cooper.—Filed June 6, 1871.

In the supreme court of the District of Columbia.

ELIZABETH CROPLEY
vs.
JOHN & JOSEPH COOPER. } 2341. Equity docket 11.

The order of publication in this cause having been duly published against said absent defendants, John Cooper and Joseph Cooper, and no appearance having been entered for them, and no answer filed for them, or either of them, it is by the court this sixth day of June, A. D. 1871, ordered, adjudged, and decreed that the bill be taken
20 for confessed against said defendants, John Cooper and Joseph Cooper. And it is further ordered, adjudged, and decreed that the decree pro confesso against the said William Cooper, heretofore taken on the thirteenth day of May last, be, and the same is hereby, rendered absolute against said defendant William Cooper.

By the court:

MACARTHUR, *Justice.*

Decree pro-confesso made absolute.—Filed July 10, 1871.

In the supreme court of the District of Columbia.

ELIZABETH CROPLEY
vs.
WILLIAM COOPER ET AL. } 2341. Equity docket 11.

The decree passed in this cause at the last term of this court, taking the bill filed in this cause for confessed against said defendants, John Cooper and Joseph Cooper, for want of appearance and answer, is
21 by the court this 10th day of July, A. D. 1871, made absolute against said defendants, John Cooper and Joseph Cooper.
By the court.

Order setting aside pro-confesso vs. defendants.—Filed Sept. 23, 1871.

ELIZABETH CROPLEY
vs.
WM COOPER ET AL. } 2341. Equity docket 11.

Ordered by the court, this 23d day of Sept., 1871, that the decree pro confesso, and the decree making said decree pro confesso final against William, John, and Joseph Cooper, be and the same is vacated and set aside.
By the court:

A. W.

22 *Demurrer to bill of complaint by the defendants.—Filed Sept.* 23, 1871.

In the supreme court of the District of Columbia.

ELIZABETH CROPLEY
vs.
WILLIAM COOPER & OTHERS. } 2341. Eq. dock. 11.

The demurrer of William Cooper, John Cooper, & Joseph Cooper to the bill of complaint filed in this cause.

These defendants, by protestation, not confessing or acknowledging all or any of the matters & things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer show—

1st. That it plainly appears from the will of the said William Cooper, deceased, set out and relied upon as an exhibit with said bill, that the said Elizabeth Cropley took only a life-estate in the said lands in said bill mentioned, and is not entitled to the relief prayed by the said bill, or to any relief in the premises.

23 2. That upon facts stated and set forth in said bill, the said child of the said Elizabeth Cropley did not take, and had not at his death a vested interest in fee in the said land.

3d. That upon the death of the said child of the said Elizabeth Cropley, as set forth in the said bill, the fee in the said land descended to this defendant and his brothers John and Joseph, defendants named in said bill as heirs-at-law of said William Cooper, deceased, subject to the life-estate of the said Elizabeth Cropley, and that the said Elizabeth

Cropley's life-estate therein did not merge in the said fee, so that she hath not, under the devises of the said will, and cannot take, any portion of said estate in fee.

4th. That if the said Elizabeth Cropley shall be found entitled to any portion of the fee in said land, she takes as tenant in common with these defendants, and this court has not power and jurisdiction to decree a sale of the said land, inasmuch as by the said bill it clearly ap-
24 pears that all the tenants in common thereof are of full age.

Whereupon, and for divers errors and imperfections therein, these defendants pray judgment of this court whether they be compelled to make any further or other answer to the said bill, or any matter or thing therein contained, and that they be hence dismissed with their reasonable costs.

J. H. BRADLEY, J'R,
R. T. MERRICK,
Sol'rs for Defendants.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in law.

J. H. BRADLEY, J'R.

I, William Cooper, the defendant above named, say under oath, that I am advised and believe that the foregoing demurrer is well founded in law. I do not interpose it for delay, but desire that it may be set down and heard at the earliest practicable time.

WILLIAM COOPER.

Sworn and subscribed before me June 8, 1871.

R. J. MEIGS, *Clerk.*

25 Agreed that the affidavit of John and Joseph Cooper to the foregoing demurrer may be dispensed with, and the same remain as though sworn to by them.

JONES & ASHFORD, *for Pl'ff.*

Order sustaining demurrer and dismissing bill.—Filed Sep. 23, 1871.

CROPLEY *vs.* COOPER. } No. 2341. In equity.

The above-entitled cause having been heard on demurrer to the complainant's bill of complaint, & the same having been duly considered, it is thereupon adjudged, ordered, & decreed that said demurrer be sustained, & that the bill of complaint be dismissed.

By the court:

A. W.

26 *Appeal to general term.—Filed Sept.* 26, 1871.

In the supreme court of the Dist. of Col'a.

ELIZABETH CROPLEY *vs.* WILLIAM COOPER ET AL. } Equity. No. 2341.

The complainant enters an appeal from the decrees of the court passed

in this cause on the 23d day of Sept., 1871, striking out the decrees pro confesso, and dismissing the bill of the complainant by

N. WILSON, &
JONES & ASHFORD,
Solicitors.

Appeal allowed.

A. WYLIE.

27 Proceedings before the supreme court of the District of Columbia, in general term, commencing on the first Monday and first day of January, 1872. Present, Chief Justice Cartter alone.

SATURDAY, *February* 17, 1872.

Session resumed pursuant to adjournment. Present, Cartter, chief justice, and Justices Olin, Wylie, Humphreys, and MacArthur.

ELIZABETH CROPLEY, COMPLAINANT,
vs.
WILLIAM COOPER, JOHN COOPER, AND JOSEPH COOPER, defendants.
} 2341. Equity docket 11.

This cause having been argued on a former day of the term, as well by counsel for complainant as by counsel for defendants, and submitted to the court, it is thereupon ordered, adjudged, and decreed that the decree at the special term, from which this appeal was prosecuted, be and the same is hereby affirmed, with costs. And from this decree the complaina't, by his solicitor, Mr. Davidge, prays an appeal to the Supreme Court of the United States, and the same is allowed.

28 In the supreme court of the District of Columbia, the 26th day of February, 1872.

ELIZABETH CROPLEY
vs.
JOHN COOPER & OTHERS.
} Equity, No. 2341. Docket 11.

Know all men by these presents, that we, Elizabeth Cropley, Frederick W. Jones, and John F. Hayes, are bound unto the above-named defendants in the sum of two hundred dollars, to be paid to the said defendants, their executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 26th day of February, 1872.

Whereas the above-named Elizabeth Cropley hath appealed from the decree rendered in said cause, to the Supreme Court of the United States, to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Elizabeth Cropley shall prosecute her said appeal to effect, and answer all damages and costs if she shall fail to make good her appeal,

then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ELIZABETH CROPLEY. [SEAL.]
F. W. JONES. [SEAL.]
JOHN F. HAYES. [SEAL.]

Sealed and delivered in presence of—
THO'S H. CALLAN.

Approved.

D. K. CARTTER, *Chief Justice.*

FEB'Y 28, 1872.

29 CLERK'S OFFICE SUPREME COURT
OF THE DISTRICT OF COLUMBIA.

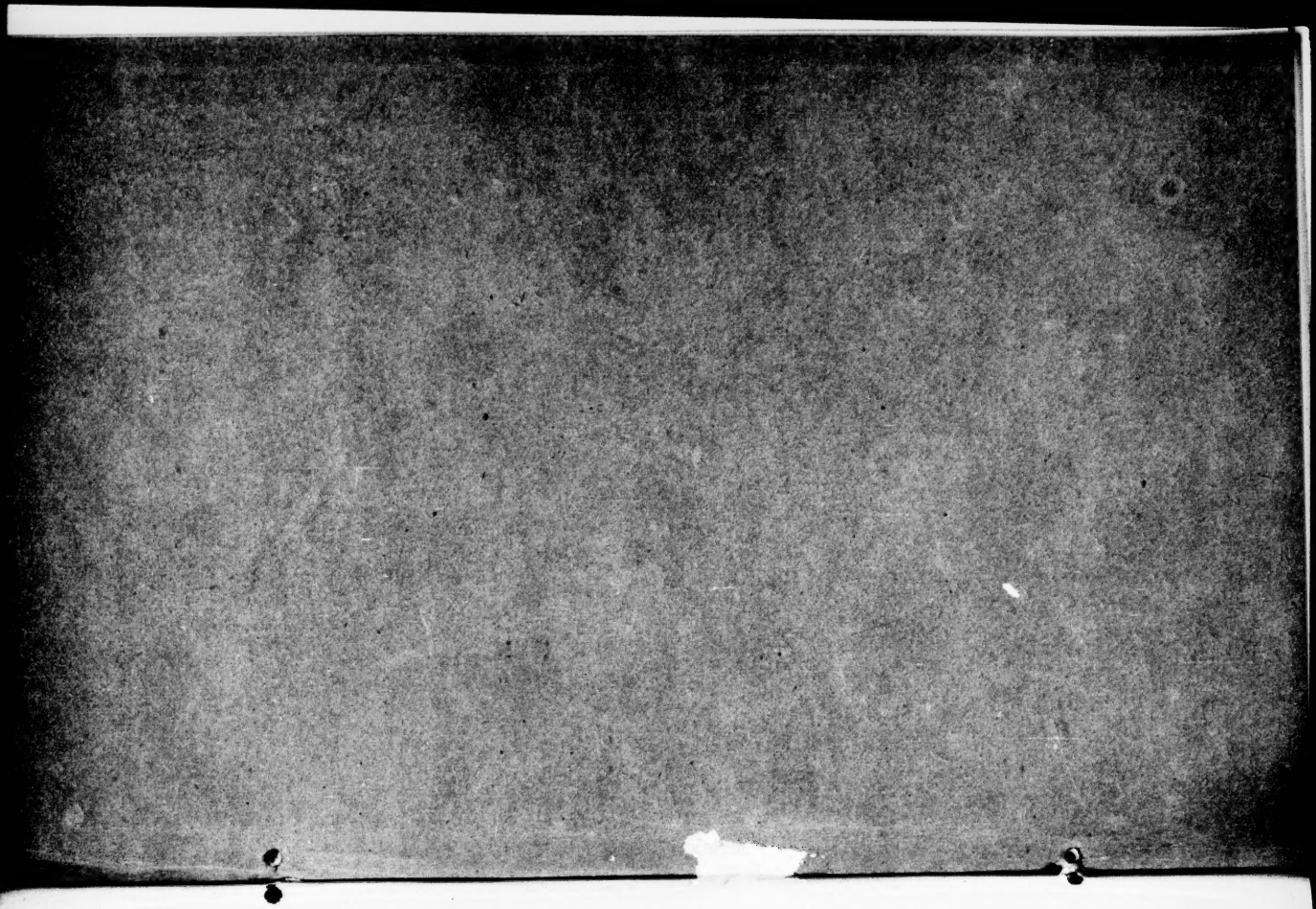
I, R. J. Meigs, clerk of said court, do hereby certify that the foregoing 28 pages of writings are truly copied from originals on file and of record in said office, and that said originals constitute the entire record in a cause pending and lately decided in said court, entitled Elizabeth Cropley, pl'ff, vs. William Cooper et al., def'ts. 2341. Equity docket 11.

Witness my hand and the seal of said court, this 3d of September, 1872.

[SEAL.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

(Indorsement on cover:) No. 416. Elizabeth Cropley, appellant, vs. William Cooper, John Cooper, and Joseph Cooper. Dist. of Columbia sup. court. Filed 12th September, 1872.



Supreme Court of the United States.

ELIZABETH CROPLEY, APPELLANT,

vs.

WILLIAM COOPER, JOHN COOPER, and JOSEPH COOPER.

BRIEF OF APPELLANT.

WALTER D. DAVIDGE,
FRED. W. JONES,
For Appellant.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1873.

ELIAZBETH CROPLEY

vs.

WILLIAM COOPER, JOHN COOPER, and JOSEPH COOPER.

No. 200.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is a bill in equity for the construction of a will. The testator, William Cooper, executed his will on the 21st of August, 1845, and died on the 22d of December, 1845.

He left a widow, Sarah Cooper, and four children, William, John, Joseph, and Elizabeth.

At the date of the will, William and Joseph were married, and had children; John was unmarried; and the daughter, Elizabeth, was intermarried with Richard Cropley, by whom she had one child, William Cooper Cropley, of the age of three years.

The will is as follows:

"I, William Cooper, of Prince George's county, State of Maryland, being of sound and disposing mind, do make and declare this to be my last will and testament: After my just debts are paid, as hereafter pointed out, I will and bequeath to my dear wife, Sarah Cooper, all my stocks which I own in corporate institutions during her life; also the rents arising from my house in the city of Washington, provided that she keep the same duly repaired, properly insured, and pay the taxes thereon. I also devise and be-

queath to my said wife the usufruct of the farm on which I now reside, for and during her life, with the option of selling the same by her, provided such a price can be obtained for it as may be deemed satisfactory by her and two competent and disinterested persons of her own choosing; in which case my will is that the proceeds shall be invested in stocks of some sound and corporate institutions, the interest from the same to be enjoyed by my said wife for and during her life, and at her death the said farm or its avails, if previously sold, as above permitted, to be appropriated as hereinafter directed.

"I will and devise to my son William, after his mother's death, the interest on twelve hundred and fifty dollars stock now held by me in the Potomac Insurance Company, Georgetown. I also will and bequeath to my said son William Cooper a vacant lot on Capitol Hill, Washington, and at his death it is my will that the said vacant lot and aforementioned stock be equally divided between his children, their heirs and assigns forever.

"To my son John I give and bequeath, at his mother's death, the usufruct of the aforementioned farm, or the interest of its avails, if previously sold, for and during his life; and should he marry and have legal issue, it is my will that the said farm, or, if previously sold, the avails thereof, together with any interest that may be due thereon at his decease, shall be equally divided amongst his children when they shall have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance. Should my said son John die without lawful issue, it is my will that the said farm, or its avails, in case of its being sold, be equally divided between my other children, to share and share alike to them, their heirs and assigns forever.

"To my son Joseph, at his mother's death, I give and bequeath, for and during his life, the interest on fifteen hundred dollars in the Alexandria Corporation Stock, held by me, and at his death the said stock to be equally divided between his children.

"To my daughter, Elizabeth Cropley, at her mother's death, I give and bequeath the rent of my house on Pennsylvania avenue, in the city of Washington, situated on square —, for and during her life; and at her death it is my will that the said —— be sold, and the avails thereof become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years of

age, the interest in the meantime to be applied to their maintenance.

"It is my will and desire that my slaves Ben and Clara be free at the death of my wife, and my slave Frank to be free when he arrives at the age of thirty, each to be paid out of my estate, when entitled to their freedom, the sum of fifty dollars.

"It is my will that my executrix pay all my just debts from the proceeds of the sale of my furniture, plate, books, cash, farming stock, and all my other personal estate not herein divided; as much of the same to be sold by her as may be necessary to pay said debts. The balance I give and bequeath to my said executrix.

"Lastly, I do hereby constitute my dear wife, Sarah Cooper, sole executrix of this my last will and testament, and revoking all others heretofore made by me.

"In testimony whereof I have, on this twenty-first day of August, 1845, affixed my hand and seal.

"WILLIAM COOPER. [SEAL.]

"Signed, sealed, and delivered in the presence of the undersigned as witnesses to the foregoing signature.

"HANSON PENN,
"J. H. T. MARSHALL,
"BENJ. O. LOWNDES."

Shortly after the death of the testator, Mrs. Cropley had another child, a daughter, who died in infancy.

William Cooper Cropley, the child living at the death of the testator, died in December, 1870, at the age of twenty-eight, without issue, leaving his mother his sole heir-at-law and personal representative.

The widow of the testator died on the 2d of February, 1854. Richard Cropley, the husband of Elizabeth, died in 1851.

After his death, his mother, then fifty-six years of age, claimed to own the house on Pennsylvania avenue, mentioned in the will, and devised to her for life, and at her death over to her child or children; but the other children of the testator, William, John, and Joseph, set up a claim to the property, as heirs-at-law, on the ground that the devise over to the child or children had lapsed, where-

by a cloud was cast upon the title of the mother, and her disposition of the property prevented.

Thereupon Mrs. Elizabeth Cropley filed this bill against said William, John, and Joseph, to obtain a construction of the will. (Rec., f. 1.)

The bill sets forth, substantially, the facts above stated. By order and decrees dated the 6th of June, 1871, and the 10th of July, 1871, it was taken *pro confesso*, and the orders to that effect were made absolute, (Rec., f. 18–22;) but on the 23d of September, 1871, the orders and decrees were set aside, and a demurrer was filed. (Rec., f. 21–25.) On the same day a decree was passed dismissing the bill. (Rec., f. 25.)

An appeal was taken to the court in general term, which affirmed the decree below, with costs. (Rec., f. 27.) The complainant then appealed to this court.

The grounds upon which the court in general term affirmed the decree below, are fully set forth in the opinion of Judge Wylie, who delivered the opinion of that court, and by whom the decree in special term was also rendered.

These grounds involve but a single proposition, viz: that the devise over to the child or children of Elizabeth Cropley was contingent upon the child or children surviving the mother, and also attaining twenty-one, and hence that the devise over did not vest at the death of the testator, nor even upon William Cooper Cropley attaining twenty-one, he having died in the lifetime of the mother.

ASSIGNMENT OF ERROR.

The court erred in holding that the devise over to the child or children of Elizabeth Cropley was contingent upon the said child or children surviving the mother, and also attaining the age of twenty-one years.

POINTS.

I. The general intent of the will is, that the devise over to the child or children of Elizabeth should vest at the death of the testator.

The testator was a married man, and the father of four children. Of these, two, William and Joseph, were married, and had children; the third, John, was unmarried; and the fourth, the appellant, was married, and the mother of one child, and, in the ordinary course of nature, might be expected to bear more. At the date of the will she was thirty years of age.

Such were the domestic relations of the testator.

His property consisted of a farm in Maryland, on which he resided; a house on Pennsylvania avenue, in this city; a vacant lot on Capitol Hill; stock in the Potomac Insurance Company; and stock in the corporation of Alexandria; together with certain furniture, plate, &c., and three slaves.

Now, mark the plan of disposition as shown by the will.

1. He appropriates the furniture, plate, &c., to the payment of his debts, and gives any balance which may be left to his wife. (Rec., f. 13.)

2. He provides for the freedom of his slaves. (Rec., f. 13.)

These objects disposed of, he turns his attention to the different members of his family.

3. To his wife he gives a life estate in the entire property, (except the furniture, plate, &c., and the slaves,) and invests her with power to sell the farm, on certain conditions, and provides that the proceeds of the farm, if sold, shall be invested in stocks, wherein she shall have a life estate. (Rec., f. 11, 12.)

Subject to this life estate, he then makes provision for his children by the following devises:

4. To William, the Potomac Insurance stock and the vacant lot on Capitol Hill, for life, and, at his death, to be equally divided among his children. (Rec., f. 11, 12.)

5. To Joseph, the Alexandria corporation stock, for life, and, at his death, to be divided among his children. (Rec., f. 12.)

These two sons were married.

6. To John, (unmarried,) the farm, or, if sold under the power to the wife, "its avails" for life; and if John should

marry, and have legal issue, (children,) the farm or its avails to be, at his death, equally divided among such children at twenty-one, the interest in the meantime to be applied to their maintenance; but if John should die without children, the farm, or its avails, to belong to the other children of the testator. (Rec., f. 12.)

7. To Elizabeth, the appellant, (who was married and had one child,) the house on Pennsylvania avenue, for life, and, at her death, to be sold, and the proceeds to belong to her child or children at twenty-one, the interest in the meantime to be applied to their maintenance. (Rec., f. 13.)

It is submitted that the plan or scheme of this will is beyond controversy.

The testator appropriates absolutely to each child, and his or her children, a specific portion of property. The child, or children of each child, is to have the residuum of estate in the property devised to the parent for life, and this residuum, added to the life estate, exhausts the full quantity of estate.

The single exception is in the case of the devise to John, and, as shown by the will, for the reason that John was not married, and might not marry. In his case *there was a devise over*, in the event of his dying without children. In all the other devises to the children there is no devise over, and for the reason that the children were married and had offspring; and hence the testator vested the residuum of the estate in such offspring, and left it there without further disposition. Subject to the life estate of his wife and children, he meant the property to vest absolutely in the children of the latter, or his grandchildren. Such a course enabled such grandchildren to dispose of the property, or, in the event of death, without disposition, left it to be dealt with by the law, which gave it to the children, if any, and, if none, to brothers and sisters, and, if none, to the parent, which was the very devolution the testator wanted, and by such a course the cruelty of cutting off the child of William Cooper Cropley, had he left one, became an impossibility.

In Goodtitle *v.* Whitby, 1 Burr, 233, Lord Mansfield said: "Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now, suppose that the object of the testator's bounty marries and dies before the age of twenty-one, *leaving children*, could the testator *intend in such an event to disinherit them?* Certainly he could not."

In Doe *v.* Perryn, 37 R., 495, Boller, J., said: "But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for if a child were born who died in the lifetime of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor."

No one will deny that the devises to William and ~~John~~ Joseph, and after their deaths to their children, vested in the latter immediately on the testator's death. Those devises, so far as they relate to personalty, are familiar examples of the rule that where an absolute property in a fund is bequeathed, in fractional interests in succession, at periods which must occur, the interests of the first and subsequent takers vest together. (2 Williams on Exs., 6th ed., 1150, 1151, 1152.) And in respect of the real estate devised to William, the devise over to his children is a common form of a vested remainder.

1 Jarman, 3d ed., 758.

Why, then, attribute to the testator an intention to discriminate between the above devises, and that to Elizabeth and her child or children? Why suppose he meant to disinherit one set of grandchildren more than another? As the children of William and Joseph undoubtedly took vested interests, what reason can be assigned for the theory that the living child and after-born children, if any, of Elizabeth were not to take vested, but only contingent interests? What reason is there to suppose that, in the case of the latter, the testator intended to depart from the mani-

fest scheme and structure of the whole will? If the child or children of Elizabeth were not to take vested interests, why was there not a devise over, as in the case of the devise to John? Why is it that in the will there is to be found no residuary clause at all?

The general intent of the testator being clear, words of doubtful meaning will be interpreted so as to conform to such general intent.

2 Jarman, 762, &c., rules 7 and 19.
Constantine *v.* Constantine, 6 Ves., 19.
Parks *v.* Parks, 9 Paige, 120.
Dawes *v.* Swan, 4 Mass., 208.

In the construction of wills, courts will look at the relations of the testator to his family property and the like.

Smith *v.* Bell, 6 Pet., 68.
2 Jarman, 762, &c.; rule 10.
6 Cruise's Dig., 158.

II. That, upon principle and authority, the devise of the house to Elizabeth for life, and at her death to be sold, and the proceeds become the property of her her child or children, at the age of twenty-one, the interest in the mean time to be applied to maintenance, gave to the child of Elizabeth living at the death of the testator, a vested interest, subject to open and let in after-born children.

It will simplify the examination of this point to suppose that, instead of the provision for sale, and the payment of the proceeds, principle and interest, to the child or children of Elizabeth, the will had given over the property in specie. The effect of the provision for sale and the disposition of the proceeds will be considered hereafter.

Suppose, then, the will had devised as follows: "To my daughter, Elizabeth Cropley, at her mother's death, I give and bequeath the rent of my house on Pennsylvania avenue in the city of Washington, situated in square ——,

for and during her life; and at her decease, it is my will that said house shall become the property of her child or children."

In such a case it is submitted to be beyond any sort of question that the child living at the testator's death would have taken a vested remainder, subject to open and let in after-born children.

A vested remainder is one by which a present interest passes to the party, though to be enjoyed in future. He has an immediate fixed right of future enjoyment. A contingent remainder is where the estate in remainder is limited either to an uncertain person or upon the happening of an uncertain event.

It is the uncertainty of the *right* of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder *contingent.* The *present capacity* of taking effect in possession, if the possession were to become vacant, universally distinguishes a vested from a contingent remainder, and not the certainty that the possession will become vacant while the remainder continues.

Doe *v* Considine, 6 Wall, 458, 476, &c.; Fearne on Cont. Rem., sec. 7, pp. 148, 149, 150; 4 Kent's Comm., 205; 1 Preston on Est., 64, 67, 70, 73, 74.

Where is there any single element of contingency in the case supposed? The death of the devisee for life is certain. The words, "at her decease," or adverbs of time, as, when, then, after, from, &c., do not import contingency, but simply point out when the estate in remainder shall take effect in possession.

Doe *v.* Considine; 4 Kent's Comm., 204.

"When a testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring merely to the determination of the prior gift, and not as designed to postpone the vesting."

1 Jarman, 658.

"The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carrying out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed, import contingency, and would, *unconnected with and unexplained by the prior gift*, clearly postpone the vesting.

"A leading authority for this construction is Boreston's case, which was as follows: A testator devised land to A. and B. for eight years, and after the said term the land to remain to his executors, for the performance of his will, till such time as H. should accomplish his age of twenty-one years; and *when* the said H. should come to his age of twenty-one, then to him, his heirs and assigns forever. H. died under twenty-one. It was contended that the remainder was not to vest in him, unless he attained the prescribed age; but the court held it to be vested immediately, the case being, it was said, nothing else than a devise to the executors till H. attained the age of twenty-one, remainder to H. in fee; and that the adverbs of time, *when*, &c., did not make anything necessary to precede the settling (*i. e.*, the vesting) of the remainder, but merely expressed the time when it should take effect in possession."

1 Jarman, 764, 765.

Neither in the case supposed is there any contingency in consequence of the beneficiaries not being ascertained. The devise over is to the child or children, and there was a child living at the death of the testator.

"Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution."

2 Jarman, 75, &c.

Doe *v.* Considine.

"In cases falling within this rule, the children, if any, living at the death of the testator, take an immediate vested interest in their shares, subject to the diminution of those

shares, (*i. e.*, to their being divested *pro tanto*,) as the number of objects is augmented by future births during the life of the tenant for life; and consequently, on the death of any of the children during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their respective representatives." "The preceding rule of construction applies not only where the future devise (*i. e.*, future in enjoyment) consists of a limitation of real estate by way of remainder, or a corresponding gift of personalty, (of which there cannot be a remainder properly so called,) but also to executory gifts, made to take effect in defeasance of a prior gift." (2 Jarman, 76, 77.) And to the same effect says Ch. J. Kent, 4 Comm., 205: "Where a remainder is limited to the use of several persons, who do not all become capable at the same time, as a devise to A. for life, remainder to his children, the children living at the death of the testator take vested remainder, subject to be disturbed by after-born children. The remainder vests in the persons first becoming capable; and the estate opens and becomes divested in quantity by the birth of subsequent children, who are let in to take vested proportions of the estate."

In Carver *v.* Jackson, Ex Dem. Astw., 4 Peters, 190, this court say, of a similar devise, "the estate is declared to the parents during their natural lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her, and their heirs and assigns forever. If we stop here, there cannot be a possible doubt of the meaning of the provision. There is a clear remainder in fee to the children, *which ceased to be contingent upon the birth of the first, and opened to let in the after-born children.*"

And see Doe *v.* Perryn, 3 T. R., 484; Goodtitle *v.* Whitby, 1 Burr, 233; Right *v.* Craber, 5 B. & C., 866; Doe *v.* Provoost, 4 Johns., 61; Hannan *v.* Osborn, 4 Paige, 336; Van Vechten *v.* Van Vechten, 5 Paige, 512; Nodine *v.* Greenfield, 4 Paige, 544; Miller *v.* Macomb, 26 Wend., 229; affirming S. C., 9 Paige, 265; Minnig *v.* Batdorff, 5 Penn., (Barr;) Chew's Appeal, 37 Penn., (1 Wright,) 23; Young *v.* Stover, *Id.*, 105; Ross *v.* Drake, *Id.*, 373; Letchworth's Appeal, 30 Penn., (6 Casey,) 175; Roome *v.* Phillips, 24 N. Y., (10 Smith,) 463, 465.

It is, then, demonstrable that in the case supposed there would be no shadow of contingency. The child in issue would take a vested interest, subject to open and let in after-born children.

The rule in Bovaston's case has already been mentioned. That rule is not arbitrary, but founded in reason. It means that where a testator is found giving the same thing to a number of persons, in succession, he means to give it to all, and hence expressions which, in the absence of a preceding gift, would indicate contingency, as referred to the time when the preceding estate is to end and the succeeding one begin. The principle is as applicable to legacies as to devises of land. (1 Jarman, 805, and cases cited; 2 Williams on Exs., 6th ed., 1150, 1151, 1152.)

And yet the main ground of the decision of the court below is, that the words "at her decease," imported contingency, and not the time when the limitation over was to take effect. The court is most explicit on this point, (Opinion, pp. 4, 5,) and declares that if William Cooper Cropley, who died at the age of twenty-eight, had left children, they would be cut off. And on page 5 the will is reconstructed, and the limitation over declared to be equivalent to a limitation to child or children, "PROVIDED HE, SHE, OR THEY SHALL SURVIVE THEIR MOTHER," and the will, as thus altered, is the will interpreted by the court on pages 5, 6, 7, 8, and 9 of the Opinion.

But to proceed. Instead of a limitation over, upon the decease of the mother, directly to the child or children, as in the case supposed, the will provides "that at her decease, it is my will that the said house be sold and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years of age, the interest in the meantime to be applied to their maintenance."

What is the effect of this provision?

1. It directs imperatively the sale of the property, and bequeaths the product of the sale. It works a conversion,

and instead of giving the land gives a legacy, the product of the land.

2. It gives this legacy to the child or children at twenty-one, the interest to be applied in the meantime to maintenance.

What does this provision not do?

1. It does not obliterate the fact that the legacy is preceded by a prior life estate in the land, of which the legacy is the product, or, in other words, is in the nature of a remainder.

2. It does not make the sale nor the death of the life-tenant a condition precedent to the vesting of the legacy. It does not give the legacy to the child or children "living at the time of sale," or "living at the death of the tenant for life." The gift is generally to "child or children."

The direction to sell is absolute, and hence there is a conversion, and the devise is a devise of money. Washington, J., delivering the opinion of this court in Craig *v.* Leslie, 3 Wheat., 564, says:

"The common sense of mankind would determine that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land."

Land devised to be sold, and the proceeds given to an alien, is so completely personal that an alien can take and hold. *Id.*

When land is directed by will to be sold and converted into money, the interest vests in the parties entitled as personal estate.

Ferguson *v.* Stuart, 10 Ohio, 140.
Sharpley *v.* Fenwood's Ex'r., 4 Har., 336.
Carr *v.* McLeod, 4 Md. Ch., 257.
Maddox *v.* Dent, 4 Md. Ch., 543.

If one of the parties entitled dies before an actual sale, the fund will go to his personal representative as money.

Smith *v.* McCrary, 3 Iredell's Eq., 503.
Pratt *v.* Talliaferro, 3 Leigh, 419, 428.

Washington *v.* Abraham, 6 Grattan, 66, 77.
Reading *v.* Blackwell, Baldwin, 166.
Marsh *v.* Wheeler, 2 Edwards, 157.

All the cases will be found collected in the note of Hare & Wallace to the case of Fletcher *v.* Ashburner, 1 Lead. Cas. in Eq., 659.

A devise of land to be sold works a conversion from the death of the testator. If the conversion is absolutely directed, it matters not that the time of the sale is postponed. A devise of land to be sold, after a life estate arising under the will, is a pecuniary bequest.

Price *v.* Watkins, 1 Dall., 10.
Fairly *v.* Kline, Pennington, 754.
Van Vechten *v.* Van Vechten, 8 Paige, 106, 124, 129.
Reading *v.* Blackwell, Baldwin, 166.
Rhinehart *v.* Harrison, Baldwin, 177.
Tazewell *v.* Smith, 1 Rand., 313.
Patterson *v.* Hawthorn, 12 S. & R., 112.
Rawlings *v.* Landes, 2 Bush., (Ky.,) 158.
Conly *v.* Kincaid, 1 Wins., (N. C.,) No. 2, (Eq.,) 44.
Conklin *v.* Moore, 2 Bradf., (N. Y.,) 179.

It follows, that where a testator has dealt with land as money, by directing it to be sold, the will must be governed by the rules applicable to limitations of personal property.

Above authorities.
Burrill *v.* Shiel, 2 Barb., S. C., 459, 470.
In re Hart's Trusts, 3 De Gex & Jones, 195.

The devise to the child or children is, then, a devise of money.

It vested at the death of the testator.

The provision under discussion gives the principal at twenty-one, and the interest in the meantime; that is, from the death of the devisee for life. Both principal and interest are appropriated to the child or children. In such a case it is clear that the provision, in respect of vesting, can-

not be distinguished from a legacy of the money, limited, by way of remainder, upon an estate for life, and to take effect at the decease of the first taker.

Fonereau *v.* Fonereau, 3 Atk., 645; S. C., 1 Ves., Sen., 118.
Hoath *v.* Hoath, 2 Bro. C. C., 4.
Hanson *v.* Graham, 6 Ves., 239.
1 Jarman, 800, 801, 802.
2 Williams on Exrs., 6th ed., 1144, 1145, 1146.
2 Williams on Exrs., 1150, 1151, 1152.
1 Roper on Leg., 390, &c.

It will be observed that the provision calls for the application of the *entire* interest, and not a mere allowance for maintenance. The *whole* interest is appropriated.

1 Jarman, 802.
In re Hart's Trusts, 3 De Gex & Jones, 195.

Here real estate was given for life, remainder to trustees to sell, and out of the proceeds to pay a legacy to a legatee when she should attain twenty-five, the legacy to carry interest from the death of the life-tenant. The legatee died under twenty-five. The legacy was held vested.

Lord J. Turner says: "Where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age, or a present gift; and if the interest is given in the meantime, it shows a present gift was intended."

Batsdorf *v.* Kebbell 3 Ves., 363, is sometimes relied on to the effect that the appropriation of interest will not vest the principal; but Lord Rosslyn puts his decision in that case upon the ground, whether right or wrong, that the relation of dividends to capital stock was different from that of interest to principal. He says: "Upon the cases it appears that dividends are always a distinct subject of legacy, and capital stock another subject of legacy." Batsdorf *v.* Kebbell was reviewed in the case of *In re* Hart's trusts, *supra*, and distinguished on that ground. In Provinchere's

appeal, 67 Penn., (17 P. F. Smith,) 463, all the authorities are reviewed. Here the testator gave a fund in trust to pay the increase to his daughter-in-law during her widowhood, and after her decease or marriage, to hold the same for the use of grandchildren, *the income to be applied to their maintenance and education, and the capital to be paid to them as they respectively attain the age of twenty-one.* Two of the grandchildren died in lifetime of the daughter-in-law: held, the legacies to them vested at the death of the testator.

And to the same effect are Schriver *v.* Cobean, 4 Watts, and Roberts' Appeal, 59 Penn., (9 P. F. Smith,) 70.

It is plain, then, that the beneficial enjoyment of the legacy is given to the child or children immediately upon the death of their mother.

In the opinion of the court below, it is urged as a reason why the legacy to the child or children did not vest, that "it was to be paid from a sale of real estate. *As to legacies of this description*, it has long been settled that, if the legatee die before the time prescribed for payment, it is lapsed *for the benefit of the heirs or even of a devisee.* The authorities establishing the doctrine, *and they are very numerous*, are collected in Mr. Cox's note to the Duke of Chandos *v.* Talbott, 2 P. Wms."

The learned judge then quotes from the opinion of the Lord Chancellor, to the effect that, where the legacy is *charged upon land*, it lapses if the legatee die before the day of payment; and adds, that so far has the doctrine been carried, that a gift of interest, which ordinarily vests a legacy, will not vest one charged upon the land. (Opinion, p. 12.)

Now, the rule as to legacies to be produced by the sale of land is diametrically opposite to that stated by the learned judge; and it is inconceivable how he could, at page 2 of the Opinion, declare that, in this case, there was a conversion prior to the death of the testator, and then refuse to accept the consequences of such conversion by treating the devise as a devise of money.

In re Hart's trusts was a case where land was directed to be sold, and ~~then~~ the devise was treated as of money; and there. L. J. Turner says, that he "had not met with any case in which it had been held, that the rules as to vesting, which apply to legacies charged on land, are to be applied to legacies given out of moneys to arise from the sale of lands."

And in Marsh *v.* Wheeler, 2 Edw. Ch., 156, 163, V. C. McConn declares that *in no case* has the rule applicable to legacies charged for land been applied where land was directed to be converted and disposed of in legacies, and adds: "Nor is there any reason for applying the doctrine. It can only be where lands are devised or descend to the heir charged with the payment of a pecuniary legacy to some third person, and payable at a future day or upon some subsequent event. In such a case, according to the general rule, if the legatee happens to die before the time appointed for payment, the law favors the heir, and considers the legacy lapsed or merged in the inheritance."

It will be observed that the only authority cited in support of this novel doctrine of land converted into money, and still remaining land, is the Duke of Chandos *v.* Talbott, and cases referred to by Mr. Cox, *which relate to legacies charged upon land.* The authorities to the contrary are too numerous to cite, but will be found in the note to Fletcher *v.* Ashburner, (*supra.*)

And even if the present legacy were charged upon land, it would be strictly within the exception to the rule, as being postponed for the benefit of the estate, that benefit being *to allow the daughter of the testator to enjoy the property during her life.* (1 Jarman, 792, 798, and notes.)

Equally untenable is the objection to the vesting of the legacy, on the ground that there is no gift to the child or children, but merely a direction to pay or distribute. As was said in Provinchere's appeal, "if not an express gift, there is what is equivalent to it." It is impossible to read the will and doubt the meaning of the testator. The words "it is my will," immediately before the provision for the

child or children, and the words "I will and devise," prefaced to the devise to William, and running through the subsequent dispositions, would appear to put the intention to give beyond the reach of cavil. There is no direction in terms to pay and devise, but the thing in money is given over.

But the learned judge has utterly misconceived the effect of a direction to pay or distribute, as distinguished from a direct gift. The rule is not as stated by him, but is subject to the qualification that if the payment or distribution is postponed *for the benefit of the estate*, then the legacy vests.

Mr. Jarman, vol. 1, p. 797, &c., discusses the subject, and says:

"But even though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sale of stock is bequeathed to A. for life, and after his decease to trustees, upon trust to sell, and pay and divide the proceeds to and between C. and D., or to pay certain legacies therewith to C. and D.; as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life estate, the ulterior legatees take a vested interest at the decease of the testator. Sir I. Wigram, V. C., has expressed his entire concurrence in this doctrine, which is further supported by numerous authorities, as well in gifts to a class as to individuals, and as well where there has, as where there has not been a trust for sale interposed between the prior and ultimate limitations, the sale being intended only to facilitate the distribution, not to postpone the vesting."

In the present case, the postponement took place obviously to provide for the daughter of the testator. (Harris *v.* Fly, 7 Paige, 421.)

Parkham *v.* Gregory, 4 Hare, 396, cited in the Opinion, and also Leeming *v.* Sherratt, 2 Hare, 14, and Smith *v.* Palmer, 7 Hare, 225, are cases where there was a direction to pay and distribute after the determination of a particular estate, and legatees had died before the period of distribu-

tion; and yet V. C. Wigram held their representatives entitled, upon the broad ground that the question was one of substance, and not of words or form, and depended upon whether the testator intended it as a condition precedent that the legatees should survive the time appointed for the payment of their legacies, and that the answer was to be sought for out of the whole will, and not in particular expressions only. And he shows clearly that Leake *v.* Robinson, 2 Mer., 363; Batsford *v.* Kebbel, 3 Ves., 363, relied on in the court below, (Opinion, 10, 11,) and similar cases, were cases where the testator had annexed *a particular description* to the persons who were to take as legatees, and of course none could take who did not bring themselves within the description.

In Smith *v.* Palmer, the V. C. says, it is immaterial whether the testator uses words of remainder, or whether the future gift is expressed in a direction to pay and distribute.

Now, in this case, the will does not provide that the child or children shall *be living at the death of their mother.*

And see Hallifax *v.* Wilson, 16 Ves., 168.
Day *v.* Day, 1 Drew, 569.
Strother *v.* Dutton, 1 De Gex & Jones, and cases cited under next point.

III. William Cooper Cropley attained the age of twenty-one. Even if the legacy was contingent until that period, it then vested.

Price v. Watkins, 1 Dallas, 10:

Devise of land, after the decease of the wife of testator, to be sold, and proceeds divided among children when they attain twenty-one, or marry. One of the children attained twenty-one, and died before widow and time of sale.

Held: that legacy was vested.

Fairly v. Kline, 1 Penn., 551.

If a testator direct all his land to be sold after his wife's death, and proceeds divided among his children, and one

of them dies before the widow; hers is a vested legacy, and goes to her husband, as her administrator.

Tazewell *v.* Smith, 1 Randolph, 313:

1. Where testator directs real estate to be sold, and the proceeds to be paid to particular persons, the interest of the legatees is a vested one, although discretion be given to executor as to the time of selling the estate.

2. The death of the devisee or legatee before the sale will not defeat the interest, unless there is some provision in the will to that effect: the interest is as much vested as if the land had been immediately and directly devised.

Per curiam: In the case before us, the conversion into money is imperative "to every intent, *out and out*," and the whole proceeds given to the two sons, and it is to them the succession must be made. There is, then, no foundation whatever for any claim on the part of the heirs-at-law of the testator.

Note. The *widow* of the testator claims as heir-at-law of her two children.

Reading *v.* Blackwell, 1 Baldwin, 166:

Where a testator devised his real estate to his executors, and directed them to apply the rents and profits to specific purposes, until the happening of a *certain* event, and then to sell it and divide the proceeds among certain legatees: *Held*,

1. Real estate to be considered as money.

2. The share of any legatee who was alive and capable of *taking* at death of testator, but died before the time of sale, went to the next of kin of said legatee.

3. That the legacies were vested, and on the death of any legatee before the time of distribution, became payable to their representatives.

Rinehart & ux., *v.* Harrison's Ex'rs., 1 Baldwin, 177:

1. It is no exception to the rule that land directed to be sold and turned into money is considered as money from the death of the testator, because the period of sale is re-

mote, and the conversion cannot be made till the time arrives.

2. If the proceeds of land devised to be sold are given to a *feme covert*, who dies before there can be a sale, the legacy is vested.

Conly *v.* Kincaid, 1 Winslow, (N. C.,) No. 2, Eq., 44:

Testator gave to his wife real and personal estate for life, and directed the sale of the whole property at her death, and equal division among his seven children named.

A daughter (one of the seven) died after the father, but during the life of the widow, leaving a husband: *Held*, that she took a vested interest in the property, which passed to her husband, as her administrator.

Ross *v.* Drake, 37 Penn. State R., 373:

Land given to a person for life, gift over to her children; all who subsequently came into existence take.

Ergo. Where remainder was limited to the *surviving* children of life tenant, their heirs and assigns, to be equally divided.

Held: "surviving" related to death of testator, and not to that of first taker; and share of one who died after testator, and before tenant for life, became vested and descended to her heirs.

Conklin *v.* Moore, 2 Bradf., (N. Y.,) 179:

Devise to E. for life, remainder to executors to sell, and pay out of proceeds a legacy to M., who survived the testator, but not the life tenant.

Held: that the legacy vested at death of testator.

Patterson *v.* Hawthorn, 12 Serg. & R., 112:

Testator ordered real estate to be sold, and proceeds put out at interest during life of wife, and at her decease to be equally divided among children "or their heirs."

One of the children died without issue, in lifetime of widow.

Held: legacy was vested, and went to her administrator.

Van Gieson *v.* Howard, 3 Halsted Ch. R., 462:

Testator devised to his widow for life, then all his real estate be sold, and proceeds equally divided among his nephews and nieces.

One of the nieces died after the testator, and in lifetime of the widow, leaving a will by which she devised her interest.

Held: that the niece had a devisable interest.

Rawlings *v.* Landes, 2 Bush, (Ky.,) 158:

Testator directed that on death of his wife, (tenant for life,) land should be sold, and proceeds paid over to his daughter.

1. *Held:* she took a *vested* remainder, and as a bequest of personal property; and on her death, before the termination of life estate, her husband was entitled to the proceeds after death of life tenant.

2. Where land is devised to one for life, and then to be sold, and proceeds paid over to others, the remaindermen take a vested remainder.

Sebastian's Estate, 1 Philadelphia Rep., 236:

A testator, after devising a life estate to his wife in all his property, directed that *what remained after his wife's death* should be sold, and the proceeds divided into four shares, each share to his four children or their heirs: *Held*, they took legacies of money, and not a devise of land, and that the legacies vested at testator's death.

Hallifax *v.* Wilson, 16 Ves., 168:

Trust by will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces equally at twenty-one, with survivorship in case any child should die before his or their shares should become payable, and a limitation over in case all should die: *Held*, vested interests at twenty-one, before the death of tenant for life.

Sir William Grant says, (p. 170:) The only question in this cause is, what is the event upon which the shares of the nephew and nieces are to go over—whether only the

death of either of them under the age of twenty-one, or their deaths either under that age or before that of the testator's mother; in other words, whether, in order to acquire a vested right, it was necessary that a nephew or niece should both survive the testator's mother, and attain the age of twenty-one. If no bequest over had been introduced, they would have clear vested interests at the age of twenty-one, whether they survived the testator's mother or not. The whole residue is given to trustees, upon trust, to pay the interest to the testator's mother during her life, and after her death to divide the principal among the nephew and nieces of the testator, share and share alike. Upon the authority of a great number of cases, that would be in the nature of a vested remainder after an estate for life, &c.

Leeming *v.* Sherratt, 2 Hare, 14.
Packham *v.* Gregory, 4 Hare, 396.
Smith *v.* Palmer, 7 Hare, 225.
Bromley *v.* Wright, *id.*, 334.
Day *v.* Day, 1 Drew, 569.
In re Hart's Trusts, 3 De Gex & Jones, 195.
Roebuck *v.* Dean, 2 Ves., Jr., 265.

It has not been lost sight of, that the devise to the widow is of the "rents" of the house in question, and the devise was to Elizabeth of the "rent;" but it is submitted that such expressions are equivalent to a devise of the land itself.

1 Jarman, 756, and cases cited.
Drusadow *v.* Wilde, 63 Penn., 170.
Young *v.* Stover, 37 Penn., (1 Wright,) 105, where the word used was "income."
Reed *v.* Reed, 9 Mass., 372.
Blanchard *v.* Brooks, 12 Pick., 63.
Blanchard *v.* Blanchard, 1 Allen, 223.
Schermerhorne *v.* Blanchard, 6 Johns. Ch., 70.

The law favors a vested interest. It will be held to exist

unless the intent to the contrary is clear and explicit. Had this presumption been duly recognized by the court below, in connection with the two prominent features of this will, first, that the testator intended to make a complete disposition of his estate, and secondly, that he supposed he had done so, as there are no limitations after those to his grandchildren, it is impossible to conceive that the conclusion now sought to be redressed could have been reached. The only legal grounds on which the Opinion attempts to justify that conclusion have already been adverted to, and shown to be founded in error. But, not content with the legal considerations which belonged to the case, the Opinion, at page 13 and 14, actually undertakes to support the conclusion of the court, upon the avowed ground that the property had greatly enhanced in value, and was stated in the argument to be worth $40,000, and that *had the testator foreseen the change* it is probable he would have made the very will which is established, *but which he did not make.*

W. D. DAVIDGE,
F. W. JONES,
For Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1873.

CROPLEY
vs. } No. 200.
COOPER *et al.*

Although admitted by the demurrer, it is thought proper to add that the interest which William C. Cropley had at the time of his death in the property in question, whatever that was, passed to the appellant, his mother, inasmuch as he died intestate, and left neither child, descendant, father, brother, sister, or child of a brother or sister; because—

I. If the property is PERSONAL estate, the property passed to the mother of the deceased, by virtue of the Statute of Distributions, in force in the District of Columbia, which is as follows:

"If the intestate leave a mother, and no child, descendant, father, brother, sister, or child, or descendant of a brother or sister, the mother shall be entitled to the whole." (*Act of Maryland*, 1798, ch. 101, sub. ch. 11, sec. 10.)

II. If it be REAL estate, the same passed to the mother of the deceased, by the Statute of Descents, in force in the District of Columbia, as follows:

"And if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendant as aforesaid, then the estate shall go to the mother." * *

"And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate, of the whole blood, and their descendants in equal degree equally; and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood and their descendants in equal degree equally; and if no such brother or sister of the whole or half blood, or any descendant from such brother or sister, then to the father, and if no father living, then to *the mother*." * * (*Act of Maryland*, 1786, ch. 45, sec. 2.)

Supreme Court of the United States.

NO. 200.—OCTOBER TERM 1873.

ELIZABETH CROPLEY v. JOHN COOPER, JOSEPH COOPER. AND OTHERS.	Appeal from the Supreme Court, District of Columbia.

BRIEF OF BRADLEY AND MERRICK, FOR APPELLEES,

Filed January 12th, 1874.

The questions in this case involve the construction of the following clause in the will of William Cooper:

"To my daughter Elizabeth Cropley, at her mother's "death, I give and bequeath the rent of my house on "Pennsylvania avenue, in the City af Washington, situ- "ated on square ——, for and during her life, and at her "death it is my will that the said ——— be sold, and "the avails therefrom become the property of her chil- "dren or child, *when he, she, or they* have arrived at the "age of twenty-one years of age, the interest in the mean- "time to be applied to their maintenance."

The will will be found on pages 3 and 4 of the record.

Elizabeth Cropley had one child at the death of the testator, who lived to be twenty-one years of age, and died intestate and unmarried in the lifetime of his mother. She also had another child who died in infancy. She files this bill claiming absolutely the property mentioned in this clause of the will. The defendants demurred.

POINTS.

I.

The intention of the testator was to give the complainant the rent of this property for her life; and if she left any child, or children, living at her death, the property was to be sold, if any such child, or children, so living was under the age of twenty-one years, the avails of the sale were to be invested and the interest applied towards the maintenance of such child, or children, until the age of twenty-one, and then the avails were to become the property of, that is to be distributed among, such children when, and as they should attain, the age of twenty-one years.

The only words of gift are the avails of land to be sold after her death, which is to become the proporty of such of her children, or child, *when* they attain the age of twenty-one years.

If there is no child living at her death, the object of the testator's bounty fails, and the condition on which the sale is to be made cannot arise.

The gift is not to grandchildren or next of kin, but to a child, or children, only. In the two devises to his sons, William and John, he provides for heirs and assigns; they being devises of real estate. In those to Joseph, and the complainant, he does not employ any words of perpetuity, nor does he by any form of expression look to any object but the immediate children. Looking then at the words the testator has employed, his intent is evident, that is to confine his bounty to the children of the complainant, and not to extend it to descendants and give them a parent's part.

But the rule on this subject is supposed to be settled by a current of decisions in England and America, and the words are to be taken in their limited sense, unless

there are other words or provisions in the will showing that the testator's intent was to use them in an enlarged sense, to take in descendants. See 2 Jar. on Wills, (marg.), 70, and note 1.

II.

The bequest is personalty, to be raised by a sale of real estate, which real estate is not to be sold till the death of the complainant. When sold the proceeds are to be divided among the complainant's children, or child. If she shall leave no child, or children, living at her death, the bequest must fail and lapse into the general estate of the testator. During the life estate of the complainant the fee is in the testator's heirs, subject, on the death of the tenant for life, to be converted into money, but if she shall leave no child, or children, living at her death, the incumbrance on the estate is gone and the fee remains in those heirs, discharged of the incumbrance.

It is settled law that if a legacy is to be paid out of the proceeds of the sale of land to be made at a future day, and the legatee dies before the time for the sale arrives, the legacy lapses. See the Duke of Chandos v. Talbort, 2 P. Wm., 610 to 613, and the authorities in Mr. Cox's note to that case.

Note 1, Perk. Ed. 1 Bro. C. C., 432 (top), to Fletcher v. Ashburner; Ackroyd v. Smithson, Ib., 437 (top), n. 2; 445. See also same case, 1 Whi. & Tu.; Lead. Cases in Equity, and the English, but especially the American notes; Cruse v. Barley, 3 P. Wms., 22, (5 ed.,) Mr. Cox's note.

1 Wm. Ex., 586, (mar.): "It is plain, therefore, that when the conversion of lands into money is directed by the testator for a particular purpose, which fails, (*as in the case of the death of a party to be benefited thereby,*) so

much of the estate, or its produce, as remains undisposed of will go to the heir." See notes, Ib., 588, (mar.): "But when no purpose of the devisor demands *in the events that have happened*, that the whole land shall be converted into money, then the heir shall take the resulting property *as land*, and it shall descend to him as heir;" and see Smiths v. Claxton, 4 Madd., 493, and the host of cases in the notes, p. 588.

The reason is, that in such and cases like the present the conversion is to take place only "for the purposes of the will," and not "out and out." See for American cases in addition to those in the note to Ackroyd v. Smithson, sup. Smith v. McCreery, 3 Ird. Eq., 208; Comm. v. Martin's Ex., 5 Mumf., 121; Morrow v. Breniger, 2 Raw., 189; Burr v. Sim, 1 Whart., 262; Prett v. Taliaferro, 3 Leigh, 423; Wood v. Cone, 7 Paige, 476; Wood v. Keys, 8 Paige, 369; Arnold v. Gilbert, 3 Sandf., 556.

Mr. Jarman, (On Wills, 1 vol, 756,) says: "In regard to sums payable out of land *in futuro*, the old rule was that whether charged on the real estate primarily or in aid of the personalty, they could not be raised out of the land if the devisee died before the time of payment, (2 Vern., 439; Prec. Ch., 195; 1 Eq. Ca., Ab, 297, pl., 2; 3 Atk., 111; 1 Atk., 432;) but this doctrine has undergone some modifications, and the established distinction now is, that if the payment be postponed with reference to the circumstances of the devisee of the money, as in *the case of a legacy to be paid to him at twenty-one years*, the charge fails as formerly, unless the devisee lives to the time of payment, (Gawler v. Standerwicks, 1 B. C. C., 106; Harrison v. Naylor, 2 B. C. C., 108; Phipps v. Ld. Mulgrave, 2 Vez., 613;) and that, too, *though the interest in the meantime be given for maintenance.*"—(Pearce v. Loman, 3 Ves., 135.

See also 2 Jar., 657, (mar.): "The established distinc-

tion now is, that if the payment be postponed with reference to the devisee of the money, *as in the case of a legacy to A B to be paid to him* at his age *of twenty-one years*, the charge fails as formerly, unless the devisee lives to the time of payment," citing Gawler v. Standerwick, 1 B. C. C., 106, note †; 2 Cox Ch. Ca., 15.

A distinction has been attempted to be set up between such legacies, the payment of which has been postponed on account of the condition of the estate only, and those postponed on account of the condition of the legatee. That cannot affect this case, because here the object of the testator was to provide not only for certain legatees, but for all those who should thereafter come into a certain class before the time of sale could happen, and was for such only as should constitute that class.

III.

This legacy is contingent, and did not vest in any of the children of complainant.

1st. It is a legacy to a class. The class must consist of her children (or child) living at her death.

2d. "It should seem, too, that where the gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or the distribution only is deferred, but is one in which time is of the essence of the gift."

Thus, in a leading case, (Leake v. Robinson, 2 Mer., 363,) where a testator gave certain real and personal property to trustees, upon trust in a certain event to pay, apply and transfer the same unto and amongst all and every, the brothers and sisters of B, share and share alike, *upon* his, her, or their attaining twenty-five, if a brother, or brothers, and if a sister, or sisters, at such

age, or marriage with consent, and the trustees were authorized to apply the rents, profits and interest, or so much thereof as they should think proper, *for the maintenance* of such brothers and sisters in the meantime. Sir W. Grant, M. R., held, this *was not a case in which* the enjoyment *only was postponed*; for there is no antecedent gift as there was in May v. Wood, (3 Pro. C. C., 474,) of which the enjoyment could be postponed, (384;) *the direction to pay* was the gift, and that gift was only to attach to children who should attain twenty-five; and see, also, Ford v. Rawlins, 1 Sim. & Stu., 328; Taylor v. Bacon, 8 Sim., 100; and especially Batsford v. Kebbell, 3 Vez., 363, and note (*a*) Sumner's edition, were A bequeathed to E the dividends which should become due after her death, upon 500 three per cent. bank annuities, until he should arrive at the full age of thirty-two years, *at which time* she directed her executors to transfer to him the principal sum for his own use. The legacy failed by the death of E, under thirty-two; the testatrix had drawn a clear distinction between the dividends and the capital. See also Sansbury v. Reed, 12 Ves., 75, and 1 Roper Leg., 500, White's edition. And in Judd v. Judd, 3 Sim., 525, A gave the residue of his estate to trustees as to one-third in trust for his daughter S, for life, and after her decease, *for the child, or children of his said daughter*, if more than one, share and share alike, to be *paid, assigned and transferred* to them upon their attaining the age of twenty-five years, &c. The Vice Chancellor held that the gift, in case the daughter should leave one child only surviving her, was clearly contingent on that child attaining the age of twenty-five, and the same construction must be put on the gift in case she should leave more than one. And see Newman v. Newman, 5 Sim., 51.

Mr. Redfield, in his Treatise on Wills, vol. 2, p. 621, pla. 39, says: "Where a gift is made to take effect in

favor of a class, it is in general held that the gift in remainder *is contingent as to the individual devisees*, since the persons composing the class are not to be ascertained until the period of the determination of the intervening estate, and there could be no vesting until the devisees are ascertained." Citing Andrews v. Partington, 3 Br. C. C., 401; (and see Mr. Eden's note to this case, especially his 2d division,) Ellison v. Amy, 1 Ves., Sen., 111.

2 Jar. Wills, 650,–1, margin. "In this state of recent authorities, one scarcely need hesitate to affirm that the rule, which reads, a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there there is no other period to which survivorship can be referred; and that where the gift is preceded by a life estate, or other prior interest, it takes effect in favor of those who survive the period of distribution, and those only."

In Cripps v. Wolcott, 4 Madd., ch. 11, bequest, of real and personal estate to husband for life, after his decease personal estate to be divided equally between two sons and a daughter, and the survivors or survivor of them, share and share alike. A, one of the sons died in the lifetime of the husband; the other devisees claimed the whole. Sir John Leach, M. R., said: "If there is no previous interest given in the legacy, then the period of division is the death of the tenant, and the survivor at his death will take the whole legacy. *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivor at such death will take the whole.* This is the principle of the cited cases of Russell v. Long, Daniel v. Daniel and Jenour v. Jenour. In Bindon v. Bindon the House of Lords found a special intent in the will, that the period of distribution should be suspended until the debts were recovered from the

crown, *and they referred the survivorship to that time.* * * Here, there being no special intent to be found in the will, *the terms of survivorship are to be referred to the death of the husband who took a previous estate.* And the principle of this case was followed in Gibbs v. Tait, 8 Sim., 32; Wordsworth v. Wood, 2 Beav., 25, S. C.; 4 Myles & Cr., 641, (where the rule is clearly stated by Lord Lansdale and approved by Lord Cottenham;) Brewith v. Stauffers, 9 Law J. N. S., Chan. 209; Pope v. Whitcomb, 3 Russ., 124; also Barber v. Barber, 3 Mylen & Cr., 688, as to a class.

The death of Mrs. Cropley's two children did not necessarily cause the devise to lapse, because it did not depend exclusively on their surviving her, but upon her leaving surviving some child, or children. The legacy is still contingent. But if she shall die without leaving a child, or children, living at her death, and the conversion cannot take place, or the time of payment be brought forward to a period before her death, the legacy must lapse.

3d. William C. Cropley, the child of Mrs. Cropley, did not take a vested interest in this bequest.

(*a.*) See the last proposition.

(*b.*) But, besides, it must appear when this interest vested. Was it at his birth? If he had been living at his mother's death, and but a year old, he would have been entitled to have the land sold, and the proceeds invested, and the interest applied to his maintenance, and the principal at twenty-one? Was it when he became twenty-one? The language of the will is, "at her decease it is my will that the said lot be sold and the avails therefrom become the property of her children, or child, *when* he, she or they have arrived at the age of twenty-one years of age." Three things must occur before they could become his property: first, his mother's death, and

second, his being alive at her death: third, and attaining twenty-one after her death.

It is a question of intention. Did the testator intend to give each of the children of Mrs. Cropley living at his death, or born afterwards, the right to the avails of this property—or did he intend they should not take such interest unless they survived their mother?

The language seems very plain. It was to become their property after the sale was made, and when they reached the age of twenty-one—not before—and they were to have the interest after the sale for their maintenance, and there could be no maintenance without a person to be maintained. The sale could not take place till after the death of the mother; they could have no right to maintenance till after the sale; and they could have no right to the principal [till they reached the age of twenty-one, and after the sale was made.

It follows that the son dying before his mother had no vested interest.

And this construction is not against any settled rule of law, but ts supported by elementary writers and decided causes.

In Redfield on Wills, p. 594, it is said: "the question of vesting, or remaining contingent, depends upon whether the condition of the intervening estate determining, and the estate over, taking effect, is one that must happen at sometime, and so as to give effect at some period to the second estate; or may never happen. If the former, then the second estate, in remainder, will always be regarded as vested. But in every case where the *existence* of the secondary estate is made dependent on a contingency which may never happen, or never happen so as to allow of the vesting of the secondary estate, then the devise or bequest must be regarded as contingent, as well in its character as in regard to the time when it will come into operation."

Here is a case in which one of the events on which the intervening estate is to determine must happen, that is the death of Mrs. Cropley; but it may not happen so as to allow the vesting of the secondary estate—that is, she may not leave any child, or children, living at her death who could take the secondary estate, and therefore it is contingent.

And See 4 Kent's., Comm., 206.

"The general rule, both in England and America, in regard to the vesting of legacies given to a class is that it shall be deferred until the time of payment, especially when they are charged on real estate." Remnant v. Hood, 6 Jur. N. S., 1173, Chancery Court of Appeals; White v. Baker, 6 Jur. N. S., 591, is to the same effect, where it is said, Scarfield vs. Howes, 3 Br. C. C., 90, is not at variance with the other cases; Young v. Robertson, 8 Jur. N. S., 826; House Lords, Collin v. Collin, 1 Bart., 630, 5th proposition, also 1 Jar. on Wills, 704; and in the American Courts, see Hawkins v. Everett, 5 Jones Eq., 42; Simpson v. Spencer, same. Vawdrey v. Geddes, 1 Rus. & M., 203; and Bland v. Williams, 3 Myl. & Kee, 40.

And where the devise is to a class, and one dies before attaining the prescribed age, it is the same as if he had never existed, the estate passing to the survivors of the class, and, so on to those of the class who shall be in existence at the time the estate vests, that being the period at which the individuals of the class were required to be definitely ascertained. 2 Red. Wills, 621, 624; Lloyd v. Lolyd, 3 Kay. & J., 20; and the comment of Sr. Sam. Romilly on Leaming v. Sharratts, in Cooper v. Cooper, 7 Jur. N. S., 178; Remnant v. Hood, 6 Jur. N. S., 1173.

There is in the case at bar a special feature which distinguishes it from the cases already referred to, and from those cited on the other side.

The same estate or interest in the subject matter is not given to the tenant for life, and to her children. There is no remainder. Her estate is distinctly a life estate in the *land and is real estate.* After her death it is to be converted into personal property, provided there is any legatee living who comes within the description in the will, as we have already seen ; otherwise it must fail. It is clear the testator intended that his daughter should not have any greater estate than a life estate, and she certainly is not within that description. The case then may be likened to a class of cases the principle of which may be said to have begun with Thickness v. Liege, 3 Bro. P. C., 365, and which has been followed by numerous other cases, some approving and others qualifying it so far as to produce no little confusion in the state of the law. The proposition is, that where the interest only is given to the first taker, and at his death or other period the capital for the first time is bequeathed to another, the bequest of the capital will not vest if the legatee dies before the first taker; for in that case the gift of the income and the gift of the capital are distinct gifts, and the legacy is not transmissible to next of kin, or executor, &c., of the legatee. This point was expressly decided by Lord Hardwicke, in Billingsley v. Wills, 3 At., 219.

Now here as we have seen, the estate given to the daughter is not given to the children; nor can the interest of the children arise till after the death of the mother, and it is then a totally different interest. Until the mother's death, the fee is in the heirs of the testator. If there is, at her death, no one in being who could call for the sale, the legacy must lapse, and if there should be any such person, a new, distinct and separate estate or interest must, for the first time be created. It is not within the principle of Boraston's case and cases follow-

ing it, for there the corpus of the bequest was given over absolutely after the expiration of a particular interest carved out of it. Here it is not given unless a child or children exist who may call for the sale of the real estate.

In further support and illustration of this point we refer to the opinion of the court below, delivered by Mr. Justice Wylie in this cause, a printed copy of which is filed with this brief.

JOS. H. BRADLEY,
R. T. MERRICK,
Solicitors for defendants.

Supreme Court of the D. C.

ELIZABETH CROPLEY
v.
WILLIAM COOPER, JOHN COOPER, AND JOSEPH COOPER.

No. 2341 Equity.
Doc. 11.

OPINION OF JUSTICE WYLIE.

S. & R. O. Polkinhorn, printers

Supreme Court of the D. C.

ELIZABETH CROPLEY v. WILLIAM COOPER, JOHN COOPER, AND JOSEPH COOPER.	No. 2341 Equity. Doc. 11.

William Cooper the father of the complainant and defendants in this suit died 22d December, 1845, having made a will a few months previously, the proper construction whereof is now sought by the complainant.

At the time of testator's death Mrs. Cropley was married, and had one child, named William Cooper Cropley, and shortly afterwards another child was born, who died in infancy. William lived till he attained the age of twenty-eight, and died in 1870, unmarried and intestate. The father of these children is also deceased. So that Mrs. Cropley is now both heir and next of kin to her children, as to their real and personal property—if any they had vested in them in their lifetime.

The will in question directs "after my just debts are paid as hereafter pointed out I will and bequeath" &c. There is no declaration of a purpose on the part of the testator, in the usual form, to dispose of "all his property of whatsoever kind," but a simple disposition of certain portions to each of his children, as set out in subsequent parts of the will.

Another unusual feature of this will is that the testator omitted to constitute any one residuary devisee or

legatee of such portions of his estate, as were not disposed of, by the will, or which might afterwards lapse from some contingency.

The particular provision which has given rise to the present controversy is in these words. "To my daughter Elizabeth Cropley, at her mother's death I give and bequeath the rent of my house on the Pennsylvania Avenue in the City of Washington situated in square for and during her life; and at her decease it is my will that the said lot be sold, and the avails therefrom become the property of her children, or child, when he, she or they shall have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance."

The mother as well as the children of Mrs. Cropley being dead, she now claims not only, her life estate in the property, but the whole estate in remainder which would have gone to her children had they survived her and attained the age of twenty-one after her death.

The defendants on the other hand claim, that the legacy to her children which was to have been raised by a sale of the property after her decease, has lapsed in consequence of their death, in her lifetime, and that the remainder in the property sinks into the estate, for the benefit of all the heirs of the testator, including as well the complainant as the defendants.

According to the doctrine of equitable conversion, the "avails," which were to be realized from the sale of the property at the death of Mrs. Cropley, are to be regarded as personal estate even from the death of the testator, subject to reconversion at the election of the legatees, should they so prefer at the appointed time. See Craig v. Leslie, 3 Wheat., 563 where the court say "The settled doctrine of the courts of equity corres-

ponds with this obvious construction of wills as well as of other instruments whereby land is directed to be turned into money, or money into land for the benefit of those for whose use the conversion is intended to be made. In the case of Fletcher v. Ashburne, 1 Bro. Ch. Cas., 497 the Master of the Rolls says that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given." He adds "the owner of the fund, or the contracting parties may make land money, or money land."

The court further say "A court of equity will not compel the trustee to execute the trust against the wishes of the cestui que trust, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations clearly indicating a determination to that effect, as by application to a court of equity."

If, therefore, the legacy to the children of Mrs. Cropley was vested at the date of the testator's death, Mrs. Cropley might, perhaps, even now, as she seeks to do, make her election against a conversion of the lot into money, and so acquire the right to make a fee simple title to a purchaser.

But since her right to make such election depends upon the question whether the legacy to her children was in fact vested at the death of the testator, it is necessary to ascertain the law on this point.

The facts that, in the present case, only one child was living at the death of the testator, and that another child was subsequently born, who died in infancy, is not mate-

rial, since in such case, where a vested legacy is given to a class, those born after the testator's death, are always admitted to equal participation with the others.

In the usual course of nature children outlive their parents; and this event is the only one which seems to have been present to the mind of Mr. Cooper in making his will, which declares "and at her decease it is my will that the said lot be sold, and the avails therefrom become the property of her children, or child, when he, she, or they shall have arrived at the age of twenty one years, the interest in the mean time to be applied to their maintenance." At the death of the testator there was but one child of Mrs. Cropley. The will directs that after the death of Mrs. Cropley and the sale of the lot, the proceeds shall become the property not of that child alone, but of her children, or child, when he, she, or they shall have arrived at the age of twenty-one years, &c. The obvious intent of the testator was that the proceeds of the sale should be divided amongst such of Mrs. Cropley's children as should survive her. If but one child survived he was to take the whole. If more than one, the proceeds were to be divided between them. It is clear that only those who should be living at the death of Mrs. Cropley were intended to share in the legacy. Suppose, in this case, that one of the children had married and then died, leaving children, and the other survived his mother, can it be doubted that the latter would have been entitled to the whole? The division of the fund was to be made when the children should arrive at the age of twenty-one, and in the mean time—that is, between the decease of the mother, and their arriving at that age—the interest was to be applied to their maintenance. Those who were to get the principal, or corpus of the fund, on reaching the age of twenty-one, therefore, were those only for whom the interim maintenance was provided;

and these could be none other than such children as should survive their mother.

This provision of the will, so far as it relates to the point now under consideration, without changing its sense, might be read as follows, "and at the death of my said daughter, Elizabeth Cropley, it is my will that the said lot be sold, and the avails therefrom become the property of her children, or child now born, or who may hereafter be born to her, provided he, she, or they shall survive their said mother."

After a full historical review of all the cases upon this question, Mr. Jarman in his work on Wills, 2 vol., 640–1, (marginal,) deduces the following conclusion: "This case," (Doe demise Long vs. Prigg, 8 B. & C., 231,) "closes the long series of authorities in favor of the construction in question, which might seem to have established, if reiterated adjudication could settle any point, that a gift to several objects, as tenants in common, and the survivors and survivor of them, vested the subject of gift absolutely in the objects living at the death of the testator, the words of survivorship being referable to that period.

The sequel will serve to show that no rule of construction, however sanctioned by repeated adoption, is secure of permanence unless founded in principle; for to the inadequacy of the grounds upon which the rule was established, it is conceived, may be ascribed, not only the frequent agitation of the question, evinced by the multitude of cases just stated, but the sweeping, and, as we shall see, sometimes, groundless exceptions engrafted on it, which at length rendered it doubtful whether such a rule of construction any longer existed, or rather occasioned its total subversion in reference, at least, to personal estate. For the reader, on a perusal of the cases,

which remain to be stated, will probably find himself impelled to the conclusion, that where there is a gift of personal estate to a person for life, or any other limited interest, and after the determination of such interest to certain persons' nominatim, or to a class of persons as tenants in common, *and the survivors of them*, these words are construed as intended to carry the subject of gift to *the objects who are living at the period of distribution.* This result, however, was not attained until after many gradations. In the first instance, survivorship was held to relate to the period of distribution, and not to the death of the testator, on the ground that the subject of gift (being the produce of land devised to be sold) was not in esse until this period."

From a large number of authorities establishing the rule, that where a legacy is given to a class of persons, and the survivors of such class, to be paid at a future time, there can be no vesting, till the period of distribution, it is not deemed necessary to refer to more than a few, which are regarded as quite sufficient to settle the doctrine.

In Brograve v. Winder, 2 Ves. Jr., 634, the facts were these, (omitting such as would be here irrelevant.) A testator devised his real estate to A for life, with remainder to trustees to sell, and directed that the money arising from the sale should be equally distributed among the three sons and daughters of W, *or the survivor or survivors of them* Lord Loughborough admitted that, in general these words would not prevent the vesting at the death of the testator, but the circumstances of this will, he said, gave it a different effect. "In this will (he observed) the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out

to be among the persons named, or the survivors or survivor. That excludes the possibility of taking in, as objects of the distribution, persons who are dead."

In Newton v. Ayscough, 19 Ves., 534, the doctrine of Brograve v. Winder was again affirmed. Sir Wm. Grant there said, "To what period survivorship is to relate depends not on technical words, but upon the apparent intention of the testator." "Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, or the survivor of them, share and share alike. That naturally points to the period of sale as the period to ascertain who are the persons to take."

So in Hoghton v. Whitgreave, 1 Jac. and Walk. 146, a testator gave his real, and the residue of his personal estate to his wife for life, and after her decease to trustees upon trust to sell the real estate; and directed that the money arising from the sale, as well as the rents from the death of the wife until the sale, as well as the personal estate, should be paid and equally divided among his nephews and nieces after mentioned, and to the survivor and survivors of them after the decease of his wife in manner aforesaid. Sir T. Plumer V. C. said "The subject matter is not to be converted into money until after the death of the tenant for life. It is then that for the first time any thing is given to the trustees. It is given upon trust to be converted into money, and then to be divided. Thus not only was there no bequest until the widow's death, but the subject matter did not till then exist in the shape and form in which it is given. It is given to those persons, and the survivor and survivors of them, and seems to fall under the general rule that legacies given to a class of persons vest in those who are capable of taking at the time of distribution."

The learned Vice Chancellor, in this last sentence, has

stated the general rule, perhaps, a little too broadly, but that is not material as affecting the authority of his decision in that case.

The only other case which need be referred to in this connection is that of Wordsworth v. Wood, 2 Beav., 25, which was subsequently affirmed by the House of Lords, and we refer to this case especially for the clearness with which the rule is laid down by Lord Langdale M. R. as follows "The rule is that where an interest is given to a person for life, and after his death to his surviving children, those only can take who are alive when the distribution takes place."

Where the gift is to a class of persons, and is not immediate, but given at some future period, none can take who are not of that class at the designated period. In such case, therefore, it would be wholly unnecessary that the testator should direct the legacy to be paid to the survivor or survivors of the class, for that is implied.

But where the gift is in presenti, solvendum in futuro to several persons by name, on the death of some it will not go to the survivors except the will have so directed.

The reason is, that, in the one case the legatee is obliged to prove his identity with the class at the time of the distribution, else he has no claim: but in the other case, the legacy having been given to particular persons by name, there will be no survivorship amongst them, unless that is provided for by the will.

Suppose a testator to devise real estate to his daughter for her life, and direct that at her death the property be sold, and the proceeds distributed between her children, A. B. C., &c., that would be a vested legacy to each of these children, and if either should die in the life time of the mother, his share of the future proceeds of the

real estate, would go to his personal representative, for the benefit of his next of kin. But if the testator intend that the shares should be divided only amongst such of these named children as should be living at the mother's death, it would be necessary to give the legacies to the survivors or survivor.

But if the future legacies be given, not to A. B. C., &c., nominatim, but to them as a class under the designation of children, then there is no gift till the period arrives for distribution, for till then it cannot be told who may survive to compose the class, and it is not necessary in such case to provide for survivorship.

The same conclusion may be reached by a line of argument suggested by another feature of the case.

It will be remembered that here we have no legacy given to the children of Mrs. Cropley, but in the direction to distribute the proceeds, after the death of their mother and the sale of the property. Such a legacy is contingent and not vested.

In Smith on Executory Interests 151 the distinction is thus stated: "It must be carefully noticed that where there is no gift, but in a direction to pay or transfer, or divide among several persons at a future period, though the future period is annexed to the payment, possession, or enjoyment, yet it is, also, annexed to the devise or bequest itself. For, in this case, the direction to pay, or transfer, or divide, constitutes the devise or bequest itself; and therefore the vesting in interest is postponed, and not merely the vesting in possession."

In Saulsbury v. Read, 12 Ves. 78 Sir Wm. Grant said "Then some of these children being dead, and as it does not appear that the youngest child has attained the prescribed age, the third question is whether their shares were vested. They are not. They could not vest until the

youngest child attained the age prescribed, for there was no substantive gift to them. The only way in which they can claim is under the direction to the executor "then to be divided amongst them in equal portions." Therefore the time of the division is annexed to the very substance of the gift: which is not an independent gift, with a time for payment or distribution appointed afterwards."

So in Batsford v. Kebbell 3 Ves. 363 the Ld Chancellor said "In this case there is no gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of thirty-two." "Therefore he does not fall within the description."

So also in Goss v. Nelson 1 Burr. 227 Ld Mansfield said "There is a known distinction between the time being annexed to the substance of the gift, or to its payment. If complete words of gift direct the executor to pay, the other words only fix the time of such payment, and then the legacy vests and is transmissible, though the legatee should die before the day of payment; as a legacy given to be paid at twenty-one. But if the time is annexed to the substance of the gift, as a legacy "if" or "when" he shall attain twenty-one, it will not vest before that contingency happens."

The same doctrine was declared also Wadley v. North 3 Ves. 366, Dawson v. Killet, Cromeck v. Laub 3 Yo & Coll (Exchq.) 576. Leake v. Robinson 2 Mer. R. 387. After a critical review of all the decisions the doctrine is thus summed up, in 1 Roper on Legacies 581 "In all the instances which have been produced the corpus of the property was *immediately* given, and the interest or fund directed to be applied, or managed for the benefit of the legatee. If, however, the interest or dividend alone be the subject of bequest *until* a particular time, and

the principal is not sooner taken out of the residue, but directed for the first time to be taken out of it, and transferred to the legatee at the end of that period, the intermediate gift of the interest or dividend will not vest the capital; because the gift and payment of it are one and the same, and it was the intention of the testator to make the gifts of the interest and of the capital, separate and distinct, so as to constitute the time appointed for payment of the principal, the very essence of the gift of it."

It was pressed upon us at the argument of the cause by the counsel for complainant that this doctrine is not to be applied, where the gift is of a residue after the termination of the life estate, and it has sometimes been thought that Booth v. Booth 4 Ves. 399 is authority for the distinction. In reference to that case Mr. Roper (1 vol. 565) says, "The last case must not be considered an authority, that, in general, a residuary bequest will vest, before the event happens upon which it is given. It proves quite the contrary. The whole tenor of Ld Alvanley's argument shows that the gift of a residue, on a contingency, or where there is no gift, but by a direction to transfer it from and after, or at a given event the vesting will be deferred till the event has happened, unless from particular circumstances (as in the last case) a contrary intention can be collected from the will. In conformity with this distinction Sir Wm. Grant determined in Leake v. Robinson, 2 Meriv 363, that a residuary disposition of real and personal estate upon trust to assign and transfer to such children as shall attain the age of twenty-five, with benefit of survivorship among them did not vest before the legatees attained that age." To the same effect are Mackall v. Winter, 3 Ves., 236, 536, Young v. Mackintosh, 13 Sim., 445, and the opinion

of Sir James Wigram, V. C. in Parkham v. Gregory, 4 Hare, 396.

In this case there was a two fold contingency in the way of vesting, first that the child, or children should survive Mrs. Cropley, and second that they should attain the age of twenty-one. And although one of the children did attain the required age before his death, yet he attained his age during the lifetime of his mother, and has since died before the happening of the event, previous to which the property cannot be sold, or its proceeds given to the children, or child of Mrs. Cropley.

Another difficulty in the way of treating this as a vested legacy, is that it was to be paid from a sale of real estate. As to legacies of this description, it has long been settled, that if the legatee die before the time prescribed for its payment it is lapsed, for the benefit of the heirs, or even of a devisee. The authorities establishing the doctrine and they are very numerous, are collected in Mr. Cox's note to the case of Duke of Chandos v. Talbot, 2 Pr. Wms. In this case it was said by the Ld. Chancellor "As far as the legacy is charged upon the land, so far shall it, on the legatee's dying before the legacy becomes payable sink, and this is the rule which has of late universally prevailed, be the legatee a child, or a stranger." And so far has the doctrine been carried, that a gift of the interest which in ordinary cases, vests the legacy, is without any such effect, if the legacy is to be raised from the land. (See 2 Wms. Exs., 900.)

It is true that to this rule there is an exception, where the time of payment of the legacy is deferred from regard to the condition of the estate, and not that of the legatee, and the legacy is given in the usual form, and not merely by a direction to sell and pay over the proceeds. But the present case, in our judgment, is plainly under the rule, and not under the exception.

We are, therefore, of opinion, that the legacies to the children of Mrs. Cropley have lapsed, that she is vested only with a life estate in the lot in controversy; and that at her death it will pass under the law of descents to the heirs at law of the testator.

Had the testator foreseen the events which have happened in his family, since his death, it is probable, he would have made express provision in his will, that this piece of his property should go, after the death of Mrs. Cropley precisely as it must now go under direction of the law. The fee simple title in this lot was stated at the argument to be now worth more than $40,000.

The life estate of Mrs Cropley alone, is worth, probably more than the absolute title of all the other shares left by the testator, to her three brothers, and their respective families.

To William he gave the interest on $1250 stock in the Potomac Ins. Co., of Georgetown, and a vacant lot on Capitol Hill, for his life, with remainder to his children.

To John he gave the use of his farm for life, or the interest of its proceeds if it should be sold, and if he should marry and have children, remainder to them to be divided when they should arrive at twenty-one years of age. But in case he should die without lawful issue the farm or its proceeds if sold to be equally divided between his other children.

And to Joseph he left the interest on $1,500, of Alexandria, Va. Corporation stock, and at his death this stock to be equally divided between his children.

John was the only one of the children who was unmarried at the time of testator's death. The other three were all married and had families. In the view of the testator John was the only one of them who might die without leaving issue; and the testator was particular to

provide for that contingency, by directing, that in that event his share of the property should be divided between his brothers and sisters.

To no one of the children did he give more than a life estate in any thing.

Had the testator foreseen it was Mrs Cropley, and not his son John who was destined to die without issue, and that even her life estate in the Avenue lot was to be worth ten times more than the aggregate value of the shares of all his sons, can there be a doubt, that he would have made the same provision, by clear and positive language, in her case, as he made in the other? He neither foresaw, nor did he provide for the event, but the law, which is wiser than the testator, supplies his neglect, and now makes for him a will, as just and equitable, as any he could himself have devised, had he foreknown all the events in his family, which have taken place since his decease.

Endorsement: 2341 Eq., Doc. 11.

CROPLEY v. COOPER.

Opinion of Court; Filed February 17, 1872.

R. J. MEIGS,

Clerk.

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